

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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 UNITED STATES of AMERICA                    ) COURT FILE  
   ) NO. 19-CR-141 (PJS/SER)  
   )  
   ) Courtroom 3C  
   ) Thursday, July 11, 2019  
 CORNETT GOLDEN                                ) St. Paul, Minnesota  
   ) 9:00 A.M.  
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**MOTIONS HEARING**

BEFORE THE HONORABLE STEVEN E. RAU  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**

**For the Government: OFFICE OF THE U.S. ATTORNEY**

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1 (9:00 a.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 (Defendant present)

5 THE COURT: Thank you. Good morning. Please be  
6 seated.

7 We're here this morning on the matter entitled  
8 United States of America versus Cornett Golden for a motions  
9 hearing.

10 Would counsel note their appearances for the  
11 record, starting with the Government.

12 MR. CHIQUOINE: Good morning, Your Honor.  
13 Alexander Chiquoine on behalf of the United States. With me  
14 at counsel table is Charlie Kovats and also Sarah Nelson,  
15 who's an intern in our office.

16 THE COURT: Good morning.

17 MR. MORRISON: Good morning, Your Honor. Aaron  
18 Morrison appearing on behalf of Mr. Golden with Kristin  
19 Zinsmaster.

20 THE COURT: Good morning.

21 All right. It seemed originally we were going to  
22 have some testimony. Now that there's been -- sounds like  
23 there's been a change of heart, how do you want to proceed  
24 here?

25 MR. MORRISON: Judge, we certainly are not going

1 to call witnesses. I think that the Government's in a tough  
2 position here in their decision not to call witnesses on the  
3 suppression issues. I understand I think from their moving  
4 papers they're going to attempt to just proffer evidence  
5 which we're going to certainly object to. There are a  
6 couple of the exhibits that were listed in their moving  
7 papers that we would agree to their admission, and if the  
8 Government's not offering any other testimony, we would ask  
9 for an opportunity to brief to demonstrate we've met our  
10 initial burden and the Government has not.

11 THE COURT: Why don't we -- let's do this:

12 Let's first address whether you've reached any  
13 agreement with respect to what I traditionally call  
14 non-dispositive motions, then discuss what evidence,  
15 Mr. Morrison, you believe the Government -- you don't have  
16 any objection to and what evidence you do have an objection  
17 to and the basis for that, and then we can discuss whatever  
18 briefing is necessary, okay?

19 So why don't we first start with the  
20 non-dispositives.

21 MR. MORRISON: I think we're actually in pretty  
22 much agreement on them.

23 The Government has indicated on their 404(b)  
24 evidence they'll -- they agree to make disclosures within 30  
25 days -- and correct me if I'm wrong, Government, as we go

1 along here, but -- so I think that one's fine.

2 The standard -- Government understands their  
3 obligations under **Brady** and **Giglio**.

4 Motion to retain agent notes, the Government  
5 indicates it's moot because they're going to do that. I  
6 still would prefer an order directing the Government to have  
7 their agents retain rough notes.

8 The only outstanding issue on the non-dispositives  
9 would be the disclosure dates for expert witnesses. I'm  
10 fine with the joint disclosure 30 days out.

11 MR. CHIQUOINE: That conforms with everything that  
12 we filed in papers. The Government agrees.

13 THE COURT: All right. So we'll issue an order  
14 that reflects that.

15 Why don't we now move to the exhibits and what you  
16 intend to proffer and what the defendant objects to.

17 MR. CHIQUOINE: Your Honor, the Government today  
18 was prepared to proffer the seven exhibits that were  
19 attached to its briefing, the omnibus response in  
20 opposition. They consist of three videos.

21 One consists of the TCF surveillance footage.  
22 That's Exhibit A.

23 Exhibit B is a radio run of the officer radio  
24 traffic during their response to the TCF robbery on  
25 March 27th.

1           Exhibit C is a Google map showing the GPS tracker  
2           route as it was tracked that day.

3           Exhibit D is video from the bus where Mr. Golden  
4           was apprehended on March 27th.

5           Exhibit E is a photo from the TCF surveillance  
6           video that police used to identify Mr. Golden on that day.

7           F is a side-by-side showing that photo, the one in  
8           Exhibit E, along with Mr. Golden's booking photo from that  
9           day.

10          And then finally, Exhibit G is a videotape of the  
11          confession.

12          THE COURT:   Okay.   All right.

13          Mr. Morrison, which of those do you object to and  
14          which do you have no objections to?

15          MR. MORRISON:   So I have no objections to Exhibit  
16          D, which is the bus video, and Exhibit G, which is the  
17          interrogation video.   I would object to the rest of them and  
18          I'd like to make a brief argument --

19          THE COURT:   You may.

20          MR. MORRISON:   Obviously this is becoming a new  
21          trend in the last number of months in our district, it  
22          appears, at least in my experience, of the U.S. Attorneys  
23          making an argument that defendants when they raise  
24          constitutional issues, Fourth, Fifth or Sixth Amendment  
25          issues, that we have not raised with specificity or there's

1 no issues there that require testimony, and have, it seems  
2 to me, started to attempt to do what they're doing here  
3 today, not put a live witness on the stand to testify about  
4 the evidence or to introduce the evidence, but instead to  
5 attempt to transform our district practice into a written  
6 motion hearing practice versus having live testimony. And  
7 oftentimes -- and I'm certainly probably guilty of this  
8 too -- sometimes our initial suppression motions are fairly  
9 thin and are fairly -- maybe don't always reach the burden  
10 needed.

11           However, in looking at this issue and looking  
12 through kind of, it seems, the history of this district and  
13 the U.S. Attorney's Office attempting to circumvent live  
14 witnesses at motion hearings, I was struck by a 1999 R&R by  
15 Judge Noel in which he stated essentially that the reason  
16 why we have motion hearings with live witnesses is because  
17 the defendant is not in a position to have often the  
18 evidence that is crucial to these kinds of hearings. You  
19 don't always capture everything that happened in a police  
20 report or what happened before a stop happens without that  
21 live testimony, and a defendant can't get that through  
22 Rule 16, especially in this district where much of the  
23 Jencks is not provided. So we are left with a vacuum.

24           And so for good reason Judge Noel said -- and I  
25 think it's been continued to this day in our district -- a

1 defendant has a duty to at least allege in their moving  
2 papers and make an argument that there are facts in  
3 controversy that give rise to a constitutional violation, a  
4 suppression issue. In this case, I believe, in our three  
5 suppression motions we've done that, and once we've met that  
6 hurdle, it is then the Government's burden of production to  
7 prove that the evidence they intend to use at trial was  
8 permissibly obtained without a constitutional violation.

9 And I think the problem is with many of the  
10 Government's exhibits that they're offering here, is that we  
11 have to take it on the Government's word, on a U.S. Attorney  
12 standing up and proffering how the exhibit was used, how it  
13 was interpreted, versus hearing an officer interpret it.

14 We also have to take it on the Government's word,  
15 for example, in Exhibit E, which is a photograph of the  
16 robber at the TCF Bank that allegedly was used by police to  
17 identify Mr. Golden on the bus. Well, how do we know that?  
18 We're taking it at the Government's word. And I don't  
19 believe the Government's lying, but that's the purpose of a  
20 hearing. That's the purpose of putting witnesses on the  
21 stand under oath so that we know the actual foundation of  
22 this exhibit. And I'm not suggesting hearsay isn't  
23 permissible. They can put the case agent on the stand to do  
24 all this, but at least we have a witness on the stand that  
25 we can cross-examine, that we can collect some facts about

1 the pieces of evidence and there's an actual record under  
2 oath versus just attorney proffers saying, "This is the  
3 photo that was used to identify your client." I mean, we  
4 need more than that. The record needs more than that.

5 And I can't agree to the remaining exhibits that  
6 are offered by the Government because of these issues. I  
7 think in the exhibits that I've agreed to they clearly --  
8 they would have been introduced with live witnesses, they  
9 are clearly are what they are, and I can agree to those, but  
10 the remainder of it I cannot agree to.

11 And I understand the Government has made its  
12 intent clear that it does not intend to call witnesses, so I  
13 would object to any other evidence being put forth in this  
14 record. I'd ask for an opportunity to brief these issues  
15 and to show that the Government -- that the defendant has  
16 made his initial burden to show that there's a controversy,  
17 and to argue that the Government just has simply not  
18 produced sufficient evidence to support anything but  
19 suppression of these three issues.

20 MR. CHIQUOINE: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. CHIQUOINE: The Government would disagree with  
23 defense counsel's initial point in that he believes that  
24 they have met their initial burden, which he doesn't seem to  
25 deny is on the defendant, to raise some genuine issue that

1 relates to suppression. He does have that burden that the  
2 **Williams** case shows. And moreover, that burden, although  
3 not substantial, it's more than nothing. It's more than  
4 three sentences in a page-and-a-half-long motion unsupported  
5 by any affidavits, declarations, or any piece of evidence.

6 Eighth Circuit case law clearly says that cursory  
7 allegations unsupported by a record are not enough to  
8 warrant an evidentiary hearing, and certainly not one with  
9 live witnesses. That's the **Stevenson** case.

10 All of the issues that are raised in the  
11 suppression motions can be settled as a matter of law based  
12 on the evidence that the Government proffers here today.

13 Defense counsel raised concern about taking the  
14 Government's word that some exhibits are what they are.  
15 There's two problems with this.

16 First, the defendant is asking for a double  
17 standard. The defendant wants you to take him at his word  
18 that the allegations, cursory as they may be, in his moving  
19 papers are fact such that he has overcome his initial  
20 burden. But when the Government proffers that, for  
21 instance, Exhibit E is the photo used by police taken from  
22 the TCF surveillance video to identify Mr. Golden on the  
23 bus, that that somehow does not constitute evidence under  
24 the circumstances. It can't be those two things. The  
25 Government can't be held to one burden while the defendant

1 is held to another one.

2 We also have the issue here -- so far there have  
3 not been any authenticity issues raised with any of the  
4 exhibits that the Government has offered here. They have  
5 all be been produced in discovery, the defendant has had  
6 them and was aware that the Government was planning to use  
7 those exhibits at today's hearing.

8 And also, Your Honor, an evidentiary hearing here  
9 is unnecessary on at least some of the motions by the  
10 defendant because they can be settled as a matter of law.

11 For instance, the motion to suppress the show-up  
12 identification, taking the facts as the defendant sets them  
13 out in his motion paper, case law is abundantly clear that  
14 the presence of police and the defendant in handcuffs during  
15 identification, while suggestive, is not impermissibly so.

16 So even taking the record as the defendant would  
17 like to have it, the case law, including the very case law  
18 that they cite in their moving paper, stands against them.  
19 Under those circumstances, there isn't a need to have an  
20 evidentiary hearing and the Court already has the record  
21 that it needs to be able to develop that or to rule on that  
22 motion.

23 I'd also like to just point out that this here is  
24 a motion -- this is a hearing on motions to suppress. It is  
25 not a discovery hearing. It's not an opportunity for the

1 defendant to go looking for discovery. It's to rule and  
2 make arguments on the defendant's suppression motions. What  
3 Mr. Morrison is essentially advocating is that this is a  
4 discovery-generating and gathering opportunity for the  
5 defense. And although Judge Noel may have written --

6 THE COURT: Clearly that's not a shock to you, is  
7 it?

8 MR. CHIQUOINE: No, it's not a shock, but simply  
9 because it's not a shock doesn't mean that it's the proper  
10 procedure under the case law as it exists and as was laid  
11 out in the Government's moving papers.

12 Thank you.

13 THE COURT: Thank you.

14 Mr. Morrison, I'm going to give you an opportunity  
15 to brief this and I'll give the Government an opportunity to  
16 respond. Do you have something else you want to say?

17 MR. MORRISON: No, I can save it for briefing,  
18 certainly.

19 THE COURT: You know, I have long struggled -- and  
20 I don't think I've had conversations with Mr. Kovats, but  
21 I've had conversations with the Federal Defender's Office  
22 and the U.S. Attorney's Office about the nature of the  
23 motion practice in this district with respect to suppression  
24 motions.

25 And simply because of the custom and practice in

1       this district, what we more often than not do is have --  
2       even though I don't like it because I don't think it  
3       adequately prepares the judge who's going to make the call  
4       at the hearing -- the sort of *pro forma* motions that  
5       Mr. Morrison makes, okay? And the Government sort of makes  
6       their usual *pro forma* response. And then witnesses are  
7       called and everyone is, you know, illuminated as to what the  
8       real issue is and we have post-hearing briefing.

9               Now, as much as I didn't like that, that seemed to  
10       work the best and it truncated the motion-practice hearing  
11       probably a little bit, but it was an effective use of both  
12       the witnesses and the testimony.

13              So I am somewhat sympathetic to what Mr. Morrison  
14       is saying, but I'm not certain that it's necessarily true in  
15       this case, because these are things -- they're not being  
16       raised about -- there's no authenticity issues raised about  
17       the video, the radio run, the Google map, or things like  
18       that. So I'm a little troubled about raising this  
19       particular issue when real testimony isn't necessarily  
20       required for the low standard of probable cause or things  
21       like that.

22              Having said that, I would like to hear from  
23       Mr. Morrison and then the Government has an opportunity to  
24       respond. I don't like the idea of sort of short-circuiting  
25       the notion of having live testimony at a suppression

1 hearing. I don't as a judge. I really don't. I recognize,  
2 however, that in this instance this may be more expeditious  
3 with some of the exhibits that are being offered.

4 So that's neither here nor there in terms of how  
5 I'm going to rule on this. It's just sort of my intuitive  
6 initial response.

7 How much time do you need, Mr. Morrison?

8 MR. MORRISON: Two weeks, Judge?

9 THE COURT: And the Government obviously would  
10 like to respond.

11 MR. CHIQUOINE: Yes, please, Your Honor. Two  
12 weeks would be sufficient.

13 THE COURT: All right. So we'll consider it  
14 submitted four weeks from now.

15 Is there anything else that anyone wants to add to  
16 the record today?

17 MR. CHIQUOINE: Just briefly, Your Honor.

18 I would argue here that the Government's response  
19 has not been *pro forma*. We submitted quite a bit of  
20 documentary evidence and also 27 pages of substantive  
21 briefing on the subjects raised by Mr. --

22 THE COURT: In this instance you're correct. I'm  
23 describing what I've seen generally, not necessarily here,  
24 okay?

25 MR. CHIQUOINE: Understood.

1 THE COURT: And, you know, Mr. Morrison was quite  
2 honest about the fact that, you know, the defense lawyers  
3 traditionally offer three sentences objecting to something  
4 because they don't really have a sense of how the testimony  
5 is going to come out or what the witness is going to say or  
6 the like. So you're right, in this particular instance it's  
7 not *pro forma*. I'm making an observation about it more  
8 generally, okay?

9 MR. CHIQUOINE: Thank you, Your Honor.

10 THE COURT: Thank you. Anything else?

11 MR. MORRISON: No, Your Honor.

12 THE COURT: Thank you. We're in recess.

13 (Proceedings concluded at 9:20 a.m.)

14 \* \* \* \*

**C E R T I F I C A T E**

I, **TIMOTHY J. WILLETTE**, Official Court Reporter  
for the United States District Court, do hereby  
certify that the foregoing pages are a true and  
accurate transcription of my shorthand notes,  
taken in the aforementioned matter, to the best  
of my skill and ability.

*/s/ Timothy J. Willette*

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